IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 457

STATE OF INDIANA, on the relation of RICHARD ZILKY,
Petitioner.

vs.

LAKE SUPERIOR COURT, ROOM 1; JOSEPH V. STODOLA, JR., as Judge of Lake Superior Court, Room 1,
Respondents.

STATE OF INDIANA, on the relation of FLETCHER NATIONAL BANK & TRUST COMPANY, a National Banking Association, as Trustee of the WILLIAM BARTLETT ESTATE, JANE R. BARRY and CHARLES R. KINNAIRD,
Petitioners.

vs.

LAKE SUPERIOR COURT, ROOM 5; JOSEPH V. STODOLA, JR., as Special Judge of Lake Superior Court, Room 5,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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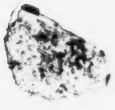

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I.

QUESTIONS PRESENTED FOR REVIEW.

There are three questions presented for review, as respondents understand the cases which are the subject matter of the instant petition. They are as follows:

(1) Whether or not writs of certiorari to the Supreme Court of Indiana should issue by the Supreme Court of the United States, in two original mandate actions in the Supreme Court of Indiana, wherein strangers to the record in the *nisi prisis* respondent Court (Lake Superior Court, Hammond, Indiana) below unsuccessfully sought the issuance of the extraordinary writ of mandate, in the Supreme Court of Indiana, to the respondent Lake Superior Court, Rooms 1 & 5, and the respondent judge to permit petitioners to intervene in purported class actions in the Lake Superior Court, Rooms 1 & 5. In both cases, hearings were conducted, evidence was introduced, and the petitions were denied. In one of the cases (Cause 52261, Lake Superior Court, Room 1) wherein petitioner Zilky sought to intervene, a final judgment had been rendered by respondent court, in favor of the City of Hammond, more than three months prior to the time petitioner Zilky filed his petition to intervene.

(2) Whether or not writs of certiorari should issue from this court to the Supreme Court of Indiana, in two original actions in mandate, wherein petitioners, strangers to the record in the respondent court below, sought writs of mandate to compel the respondent court to vacate and set aside final judgments in favor of the City.

(3) Whether or not this court has jurisdiction to entertain a petition for writs of certiorari to the Supreme Court of Indiana, wherein this court's jurisdiction is sought to be invoked under 28 U.S.C. §1257(3) but where no federal question is presented as set forth in 28 U.S.C. §1257(3), and petitioners seek to invoke the jurisdiction of this court under said section.

II.

STATEMENT OF THE CASES.

The two cases, which are the subject matter of the petition, in opposition to which this brief is filed, were original actions in the Supreme Court of Indiana seeking the issuance of the extraordinary writ of mandate. In "Original Action No. 30024" in the Supreme Court of Indiana, the Lake Superior Court, Room 1 (Hammond, Lake County, Indiana) is a respondent. The subject matter of said original action is Lake Superior Court, Room 1, Cause No. 52261. Hon. Joseph V. Stodola, Jr., is and was the duly elected, qualified and acting judge of the respondent Lake Superior Court, Room 1, and is also a respondent in said cause.

In "Original Action No. 30025" in the Supreme Court of Indiana, the Lake Superior Court, Room 5 (Hammond, Lake County, Indiana) is a respondent. Hon. Joseph V. Stodola, Jr. was selected as special Judge in Lake Superior Court, Room 5, Cause No. 57536, which was the subject matter of said original action, and is also a respondent in said action.

The purported class actions were filed in the respondent courts on February 14, 1939 (Cause No. 52261, Lake Superior Court, Room 1) and October 23, 1944 (Cause No. 57536, Lake Superior Court, Room 5). Both actions sought money damages, in favor of the purported class, against the City of Hammond, for alleged "misapplication and diversion of funds", on behalf of purported owners of City of Hammond Special Improvement Bonds. The City of Hammond, Indiana, was not the obligor on any of said bonds.

Thereafter, on March 11, 1947, and February 28, 1947, in the Lake Superior Court, Room Nos. 1 & 5, respectively, fraudulent judgments were entered against the City of Hammond for so-called misapplication and diversion of funds pursuant to a conspiracy entered into between the attorneys for the alleged plaintiffs and certain City officers.

On June 7, 1947, and June 14, 1947, respectively, Jay E. Darlington, a taxpayer of the City of Hammond, Indiana, commenced two actions in the Lake Superior Court, Rooms 1 & 5, to enjoin the City of Hammond from paying the judgments rendered in the above causes, as well as 96 other causes in the Lake Superior Court, Rooms 1, 2, & 5. $958,000.00 worth of judgments had been rendered against the City of Hammond, in said cases, for "misapplication and diversion of funds". The venue of the two taxpayer's actions was changed to the Porter Circuit Court, Porter County, Indiana, and the two actions were consolidated for trial. On September 7, 1948, the Porter Circuit Court entered its Special Findings of Fact and Conclusion of Law thereon, and rendered its decree thereon, finding all judgments in said causes void for fraud in their procurement.

As appears from the opinion of the Supreme Court of Indiana in Cause No. 30025, appearing in Appendix A to the petition herein, beginning at page 23 of the petition, at page 29, "the fraud consisted, generally, of the fact that the judgments were taken by the consent of the plaintiffs and defendant without any proof, although the named plaintiffs in the class actions were not bona fide holders of the bonds which they alleged to own or the bonds had been outlawed by the statute of limitations." The defendants in the taxpayer's case, (excluding the City of Hammond which joined the taxpayer as appellee in the ap-

peal) took an appeal to the Appellate Court of Indiana. See *Gilkison* v. *Darlington* (1952) 123 Ind. App. 28, 106 N.E. 2d 473. All of the original exhibits, introduced in the trial of the taxpayer's case, were made a part of the record on appeal by defendants-appellants (including the purported predecessors in interest of petitioners herein). See *Gilkison* v. *Darlington* (1952) 123 Ind. App. 28, 106 N.E. 2d 473; and *State, ex rel. Gilkison* v. *Clifford, Judge*, (1950) 120 Ind. App. 84, 89 N.E. 2d 630.

On June 23, 1954, the Porter Circuit Court, upon remand of the cause, restated its conclusions of law and entered its judgment in accordance with the mandate of the Appellate Court in the case of *Gilkison* v. *Darlington*, supra. On March 4 & 9, 1960, respectively, the City of Hammond filed motions in the respondent courts, Lake Superior Court, Rooms 1 & 5, to dismiss each of said actions (Cause Nos. 52261 and 57536) and have them stricken from the docket because of abandonment. Copies of the motions were served on the counsel of record for the plaintiff in each of said causes, Donald C. Gardner and Carl A. Huebner, respectively. In the Room 5 case (Cause No. 57536) Carl A. Huebner was also one of the four named plaintiffs (see Appendix A to petition herein, page 24).

On March 14, the respondent Lake Superior Court, Room 1, (Cause No. 52261) entered a judgment dismissing said action.

On June 27, 1960, Richard Zilky, petitioner herein, filed a petition to intervene in said cause as a party plaintiff, and on the same day filed a motion to vacate and set aside the order of dismissal entered by respondent court on March 14, 1960. (See petition, Appendix A, page 20.) On July 11, 1960, the defendant, City of Hammond, filed a motion in said cause to strike pleadings and papers of said

Richard Zilky. On July 28, 1960, the cause was submitted and evidence was heard (see petition, page 8) and on the following day respondent court entered an order denying Zilky's petition to intervene, and ordered his motion to vacate the dismissal stricken from the record. (See petition, Appendix A, page 20.)

In the Room 5 action here involved (57536) the cause was set for hearing on March 25, 1960, on which date Attorney Paul B. Huebner, appeared, but no further action was taken. (See petition, Appendix A, page 26.)

On April 18, 1960, pursuant to a change of venue from the judge, respondent Joseph V. Stodola, Jr. was appointed special judge. Thereafter, American Fletcher National Bank & Trust Company, Jane R. Barry and Charles R. Kinnaird filed "Petitions to Intervene" (See petition, page 9). Thereafter, the cause was submitted on the petitions to intervene and the City of Hammond's answers and objections thereto, evidence was heard (petitioners rested without offering any evidence) and on June 20 the respondent court entered an order denying the petitions to intervene. On said date, respondent gave petitioners 10 days for filing supplemental complaints with respect to any bonds on which said parties individually held as successors in interest. (See petition, Appendix A, page 26.)

Thereafter, petitioners, on June 23, 1960, filed a supplemental complaint in which they alleged that they were holders and owners of Barrett Bonds of the City of Hammond in which they purported to adopt in toto the complaint of said former owners (in the nature of a class action). (See petition, Appendix A, page 26.)

On June 27, 1960, the City of Hammond filed objections to and a motion to strike the supplemental complaint. (See petition, Appendix A, pages 9, 26, 27.) On July 7, the cause

was submitted on the City of Hammond's motion to strike the supplemental complaint and the City of Hammond's objections thereto. The supplemental complaint, which purported to "adopt the original complaint" was ordered stricken from the record. (See petition, Appendix A, page 27.) On July 27, respondent court entered findings among other things, that the motion to dismiss and strike the cause of action, because of abandonment, had been filed in the cause on March 9, 1960, notice had been served upon representatives of the class action, no response to the motion had been filed asserting any meritorious ground or reason why the cause should not be dismissed, and the court then, on the basis of the record before it, entered an order dismissing said cause for want of prosecution and the same was ordered stricken from the docket. (See petition, Appendix A, page 27)

On October 19, 1960, petitioners filed their respective original actions in mandate in the Supreme Court of Indiana seeking to command the respondents to set aside the orders complained of, as hereinabove set forth. (See Appendix A to petition, pages 19-31, incl.)

Respondents filed their returns to the alternative writs, issued by the Supreme Court of Indiana, on November 18, 1960. (See petition, page 10)

On May 23, 1960, the Supreme Court of Indiana, with an opinion in writing, in each of said mandate actions, dissolved the alternative writs and denied permanent writs. (See petition, Appendix A, pages 19-31, incl.)

On June 9, 1961, petitioners filed petitions for rehearing, and briefs in support thereof, in each of the mandate actions. On June 30, 1961, (Petition, page 11) the petitions for rehearing were denied by the Supreme Court of Indiana without opinion. (Petition, page 11).

III.

REASONS WHY THE CAUSES SHOULD NOT BE REVIEWED AND WHY THE WRITS SHOULD NOT ISSUE.

A.

No Federal Question, as Required by 28 U.S.C. §1257(3) Was or Is Involved.

At the outset, it is submitted by respondents that this court is without jurisdiction to review the causes involved herein because, contrary to the "jurisdictional statement" at page 2 of the petition, no federal question, as required under 28 U.S.C. §1257(3) was or is involved. The Indiana Supreme Court, under the applicable Indiana statutes, decisions, and Supreme Court rules, properly and correctly, in each of the two cases herein involved, denied the petition for the extraordinary writ of mandate.

The reasons for the denial, in each of the cases, clearly appear upon the face of the opinions of the Indiana Supreme Court and involve only state questions. (Petition, Appendix A, pages 19-31, incl.)

Therefore, no jurisdiction is conferred on this court under 28 U.S.C. §1257(3).

Even if there were a federal question which could have been raised below, to bring petitioners within the scope of 28 U.S.C. §1257(3), (which there was not) no such question was ever raised, or attempted to be raised, by petitioners either in the respondent courts or in the Indiana Supreme Court, in a manner which might or could confer jurisdiction on this Court.

The petitioner's contention, at page 15 of their brief, that the federal question sought to be reviewed was first raised in the petitions for rehearing filed by the petitioners in the mandate actions in the Supreme Court of Indiana, is erroneous.

While it is conceded by petitioners that no federal question was raised in respondent courts below, or in the Supreme Court of Indiana in the mandate actions, prior to the filing of their petitions for rehearing, an examination of the petitions for rehearing reveals that even in said petitions there was no attempt to "inject" a federal question. At page 11 of the petition, under the heading "Statement Of The Cases" reference is made not to the petitions for rehearing, but to the composite brief which petitioners filed in support of said petitions.

In Appendix C, petition, pages 38-41, petitioners set out portions of the record which they claim shows that the federal question was timely and properly raised. This contention is entirely without merit.

It is significant that the portion of the record quoted at page 38 of the petition is a quotation from the "concluding portion of the brief filed by the petitioners on June 9, 1961, in the Supreme Court of Indiana in support of their petitions for rehearing", and not from the Petitions for Rehearing.

Thus, it affirmatively appears on the face of the petition, and Appendix C thereto, that the statement at page 15 of the petition, that the federal question sought to be reviewed was first raised in the petitions for rehearing filed by petitioners in the mandate actions in the Supreme Court of Indiana is contrary to the record.

Rule 2-22 of the Supreme Court of Indiana, set forth at pages 35 & 36 of the petition, Appendix B, clearly states